

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1049

To be argued by
DARNELL J. BLACKETT

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PB
S*

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

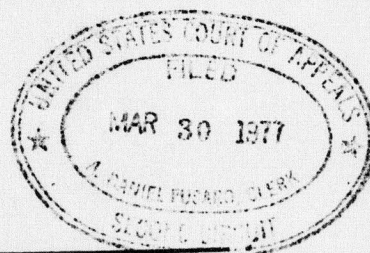
vs.

GUILLERMO ROSADO, JR., a/k/a William Montijo, Jr.,
Appellant.

*On Appeal from the United States District Court for the
Southern District of New York.*

BRIEF FOR APPELLANT

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Federal Rules of Criminal Procedure, Rule 29a, 18 U.S. Code annotated

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x

UNITED STATES OF AMERICA

Appellee

-against-

GUILLERMO ROSADO, JR. a/k/a
"William Montijo, Jr.,"

Appellant.

- - - - - x

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the verdict of the jury upon which the judgment of the Court was based was contrary to the weight of the evidence adduced.
2. Whether the testimony offered by the government's witness-in-chief, largely in conflict with the testimony of its supporting witness, was sufficient to establish Appellant's guilt beyond a reasonable doubt on the issues of (a) ownership or possession of the firearm in question; (b) making or altering of said weapon; (c) sale or transfer of the firearm and (d) whether Appellant's act or acts with reference to either or all of the referred to conduct gave rise to conspiracy.

3. Whether the evidence offered by the appellant, when juxtapose to the government evidence, was not sufficient to warrant an order directing a new trial notwithstanding the verdict.

STATEMENT PURSUANT TO RULE 28(a) (3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York, by Honorable Milton Pollack, rendered after a jury trial convicting appellant, Guillermo Rosado, Jr., for conspiring with others to violate the Federal Gun Control Act of 1968; of knowingly making and altering firearms or aiding or abetting others in the making or altering of a firearm without paying the applicable tax or filing a written application with or obtaining the approval of the Secretary of the Treasury to make and register the firearm; of possessing said non-registered firearm and of illegally transferring or aiding and abetting others in the illegal transfer of the firearm in violation of Title 26 United States Code Sections 5821, 5822, 5861(f) and Title 18 United States Code, Section 2.

Judgment was entered December 28, 1976, by which, appellant was committed to the custody of the Attorney General or his authorized representative for treatment and supervision

pursuant to 18 U.S. Code Section 5010(b), and until discharged by the U.S. Parole Commission as provided in 18 U.S. Code Section 4216.

Statement of Fact

Guillermo Rosado, Jr., herein referred to as Guillermo, Jr., to distinguish him from Ruillermo Rosado, Sr., was indicted with Osvaldo Rosado and "Rubin Rosado", August 29, 1975, for conspiracy to violate the United States Gun Control Law and the violation of that law. Osvaldo Rosado earlier pleaded guilty to four counts of an indictment, including conspiracy, to cover the entire indictment, such as it was. "Rubin Rosado", knowledge of whom was testified to by two government witnesses, Special Agent, Joseph Kelly and informant Clyde Allen, but denied by Guillermo Jr.'s witnesses, Osvaldo Rosado and Maria Rosado, has not been apprehended or tried or his whereabouts known to the government (p. 38a).

The indictment followed on testimony given before the Grand Jury by the Government's witness-in-chief, Special Agent Joseph Kelly without corroboration by Clyde Allen, his investigative associate and hired informant.

The Trial

The government's case was based upon an altered rifle exhibit, testimony of an undercover agent and a hired informant, whose testimony, on material issues, was in conflict with that of the undercover agent and witness-in-chief. The appellant's case was predicated on testimony in direct contradiction to evidence given by the government's chief witnesses, Joseph Kelly and Clyde Allen. Appellant's defense was that he was a mere bystander on August 7, 1975 at best, and not a participant in the crime, nor was he present at or a participant in the acts committed August 8, 1975.

A. The Government's case

Joseph Kelly, Special Agent and undercover operative for the U. S. Treasury Department's Bureau of Alcohol, Tobacco and Firearms, some six years, (p.10a) hired Clyde Allen (p.20a) a convicted felon, still on probation, (p.44a-45a) to assist him in the assigned task of investigating the sale of illegal guns and explosives in the Yonkers area. Among Clyde Allen's convictions was one for burglary (59a). The informant,

Clyde Allen was paid, by the job or case (p.20a), which at times amounted to causing a mere arrest (p.59a-60a), and at other times, even less (p.19a). In the early evening of August 7, 1975, by reason of information given to him the undercover agent and Clyde Allen went to 154 South Broadway, Yonkers, N. Y., the home of the Rosado family where Guillermo, Jr. was then living with his mother, Guillermo Rosado, Sr., two sisters and his brother, Osvaldo, with whom he shared a bedroom. The undercover agent and the informant was met at the undercover's car by Osvaldo Rosado (p.11a-12a, 89a) who after a short conversation about the subject of the sale and price took the informant up to his and Guillermo Jr.'s bedroom where he showed him the firearm which was to be sold (p.74). Osvaldo Rosado remained in the bedroom while the informant went back to talk to the undercover agent and to bring him upstairs to see the firearm. On returning to the bedroom with the undercover agent three persons were seen taking turns at attempting to shorten the barrel of a rifle by sawing part of it off. The persons were Osvaldo, Guillermo Jr., and "Rubin Rosado", the latter two of whom were introduced to the undercover agent as "Willie" and "Rubin" (p.12a-14a). During the next

10 to 15 minutes only the undercover agent and the informant were in the bedroom with Guillermo Jr., Osvaldo and "Rubin". No conversation whatever was had between the undercover agent and Guillermo Jr., nor did they engage in discussion with respect to the firearm which the undercover agent was told belonged to Guillermo Jr. (p.12a). Rather, all conversations concerning the firearm was had with Osvaldo Rosado (p.32a-33a) on August 7, 1975 and August 8, 1975 when the undercover agent returned to discover Guillermo Jr. in the bedroom where he had seen him the evening before and where, this time, the barrel of the gun was seen to be shortened. The packing and presenting, or giving, of the firearm in sale to the undercover agent was done by Osvaldo Rosado who was in control of the situation all the way (p.16a-19a). Notwithstanding failure of conversation with Guillermo Jr., with respect to the transaction, the undercover agent gave him \$150. (p.17a, 51a).

The informant testified that on arriving at 154 South Broadway with the undercover agent August 7, 1975 he "went upstairs, knocked on the apartment door and was let in by (Osvaldo) Cano's mother, that he went through the apartment to the back room....." (p.47a-48a)

where they were sawing the rifle.," that he went down and brought the undercover agent back to the room where the sawing continued until he and the agent left. He further testified that on the following day when he and the undercover agent returned with Osvaldo to the bedroom,(theyl "we were all in the apartment together after that, the three of us, Joe Kelly, Cano (Osvaldo) and myself, and the rifle was already sawed off when we got there." (p.50a) and further, that the undercover agent paid money to Willy (Guillermo Jr.) "at that time they were talking about the sale of .32 revolver" (p51a) and "Before we left, Willy (Guillermo Jr.) was asking Joe (undercover agent) if he wanted to buy a .32 revolver. Joe asked him "how much" and he said (\$150). Joe said that he would have to see the gun" (p.51a-52a).

The informant testified too that the undercover agent gave Cano (Osvaldo) some money in the hallway (p.52a); that he and Guillermo, Jr. had known each other 3 months, prior to August 7, 1975, that Guillermo knew he was in the gun business, yet never inquire of him whether he was interested in purchasing a gun (p.56a) or knew anyone else who was interested in purchasing it.

No evidence was offered on direct concerning conversation between Guillermo Jr. and the undercover agent or Guillermo Jr. and the informant there at Rosado's apartment August 7, 1975. The proof was that there was no conversation between Guillermo Jr. and

anyone. Notwithstanding, the informant testified that Willy (Guillermo Jr.) told him at the apartment that he wanted \$250 (p. 58a). Contrary to the undercover agent's testimony of a conversation between himself and "Rubin Rosade" August 8, 1975 after placing the gun in the car trunk and entering the car with the informant and Osvaldo (p. 115a, 80a-81a) the informant testified that he did not recall such incident.

Again, there was evidence of a conversation between Osvaldo Rosado and the undercover agent regarding the price of the rifle August 7, 1975 (p. 26a, 114a). The informant testified there was no such conversation (p. 72a).

B. THE DEFENSE CASE

On August 7, 1975, in the evening, Joseph Kelly, undercover agent and Clyde Allen, a hired informant, went by car to the home of Guillermo Jr., 154 South Broadway, Yonkers, New York, pursuant to a telephone conversation the informant had with Osvaldo Rosado, his brother, concerning the sale of a rifle. On arriving at the premises they were met by Osvaldo Rosado who went down from the apartment on the second floor to meet them. Thereafter, Osvaldo returned to the apartment, specifically, his and Guillermo Jr.'s bedroom, where the undercover agent and his informant later went to further the transaction for the sale of the rifle Osvaldo Rosado had discussed with the informant (p. 85a-87a) and showed him the rifle and talked price minutes before.

On arriving at the bedroom the evening of August 7, 1975, they were let in by Osvaldo Rosado (p.13a). Guillermo Jr. was in the bedroom at the time and was introduced to the undercover agent and the informant on their entry (p. 92a, 102a). Guillermo Jr. remained there in the bedroom some three minutes and left, never taking part in the sawing down of the rifle barrel (p.102a, 106a), nor in the sharing of the profits or proceeds of the sale (p.106a-107a).

On August 8, 1977, the undercover agent and the informant picked up Osvaldo Rosado in the afternoon outside of his place of employment; drove to a hardware store where the undercover agent purchased a hacksaw for Osvaldo who, at the time, did not need it since he had completed the sawing off of the rifle barrel the night before (p. 98a). They left the hardware store, thereafter, and motored to Osvaldo's home to complete the rifle transaction.

On arriving there, Osvaldo went up to the apartment and a few minutes later, the undercover agent and his informant followed. On this occasion Guillermo Jr. was not there, nor did he subsequently go to the bedroom during the presence of the undercover agent and the informant there, August 8, 1975 (p. 99a-101a, 50a). Payment for the altered rifle was made to Osvaldo Rosado in the undercover agent's car, August 8, 1975 as was payment for "arranging" the sale (p.104a, 105a). The entire transaction was negotiated by Osvaldo Rosado with Guillermo Jr.'s name interjected to assist in the wholesale arrest of male members of the Rosado family concerning whom warrants were issued August 19, 1975

(p.28a-29a, 34a). Further, all acts relevant to the crime were committed by Osvaldo Rosado who admitted, with corroboration, initiating the contract, preparing the subject of the sale, delivering the same after bargaining with the agent on price and again, collecting payment (p.102a-111a).

ARGUMENT

POINT I

FAIR ASSESSMENT OF THE EVIDENCE,
SHORN OF ATTACHMENT OF GUILTY BY
ASSOCIATION, RENDERED JUDGMENT OF
APPELLANT'S NON-GUILT, THE ONLY
JUST COURSE.

Oswaldo Rosado, brother of Guillermo Rosado Jr., dealt in the sale of guns extensively and had developed a reputation for selling and bringing together purchaser and seller of guns for a period extending back some six months before a warrant to arrest Guillermo Rosado, Jr. for engineering the sale of a firearm through Oswaldo Rosado. Oswaldo Rosado had testified, somewhat brazenly too, sale of guns to the "Feds". His demeanor on the stand was one of brashness; almost haughtiness in his testimony concerning the sale of firearms. Yet Oswaldo Rosado was the only witness in possession of all the facts with respect to the occurrence of August 7th and 8th at 154 South Broadway, Yonkers, New York, and the only witness available to Guillermo Rosado Jr. in his defense to the indictment. The testimony was clear; not only through the government's witness-in-chief, the undercover agent, who testified to the six-month span and the numerous transactions on gun matters had with Oswaldo Rosado, but Oswaldo Rosado also testified in corroboration thereof.

Further, Oswaldo Rosado and Guillermo Rosado, Jr., lived in the same apartment and shared the same bedroom as brothers. Too, they

spoke the same language and, doubtless in many instances, shared likes and dislikes, attraction and repulsion. Such being the case, it was not difficult for a jury to attach Osvaldo Rosado's guilt with respect to the violation of the Gun Control Act to Guillermo Rosado, Jr., no matter the pureness of his integrity and the trueness of his innocence. Particularly was this difficult to accomplish when there being no other witnesses to the crime, Osvaldo Rosado, Guillermo Rosado's brother, had to fall back on his brother, the only possible witness. "Rubin Rosado", a named defendant, was declared by Osvaldo Rosado and Maria Rosado, Guillermo Rosado Jr.'s mother, to be nonexistent in their knowledge and relation.

It was therefore not difficult for the jury to bring in a verdict against the weight of the evidence offered by the appellant through Osvelto Rosado with the material shortcoming of the government's evidence, which had to do with observing Guillermo Rosado sawing the barrel of a rifle by two witnesses and the payment to him of \$150; one testifying that the payment was made at the place where the altered rifle was delivered and the other testifying that the only persons in the room on the date they returned to pick up the altered rifle was the two witnesses and Osvelto Rosado.

Further, Osvelto Rosado admitted to initiating the conversation for the sale of the rifle, showing the product to one of the witnesses and talking price with him, delivering the finished product to the other witness

and going with him to his car where payment for the firearm altered in violation of the Gun Control Act was made to him. Osvelto Rosado also testified that Guillermo Rosado, Jr. was present in the bedroom where the gun was being altered on August 7, 1975, the day when the agents went there to negotiate and bargain for the sale of the rifle, but they took no part in any of the acts then or thereafter, and the government's witness testified that no conversation whatever was made with Guillermo Rosado, Jr. there at the apartment or otherwise.

It is a principle of law, long revered, that evidence of defendant's presence at the scene of a crime, slight association with actual purpose and subsequent flight was insufficient to sustain a conviction for altering firearm as charged. Nor can an inference of crime be drawn merely from presence (U. S. v. Williams, 344 US 58); a culpable purpose is essential (Hicks v. U.S., 150 U.S. 442). Federal Rules of Criminal Procedure, Rule 29a, 18 U.S. Code annotated; Bailey v. U.S. 416 F2d 1110; 135 U.S. App.

In an effort to sustain the indictment, the government made much of the appellant's (flight) from the jurisdiction following the alleged crime but is is also a well-known principle and a proposition of law that one who flees shortly after a criminal act or when he is accused of committing it does so because he feels guilt, is not absolute as legal doctrine; it is a matter of common knowledge that men who are entirely innocent do sometimes flee from the scene of a crime through fear of being apprehended

as guilty party or from unwillingness to appear as a witness. This was the holding in *Wong Sun v. U.S.*, 371 US471, 483-484, and further, 83 S.C.407; *Alberty v. U.S.* 162 US499, 511.

There seemed to be little doubt that the fact of the government's witness-in-chief's failure to communicate with Guillermo Rosado, Jr. was lost upon the jury, not only because of the "guilt by association", but also by interjection of the Court in its characterization or paraphrasing of appellant's witness' testimony to the effect that they panicked into telling the truth with respect to his plea of guilt in his earlier appearance before the Court.

CONCLUSION

THE EVIDENCE BEING SUFFICIENT TO SUSTAIN AN ACQUITTAL AND THE DISTRICT COURT PERMITTING THE CASE TO GO TO JURY, VERDICT THAT CONCLUDED THE APPELLANT'S GUILT AND CONSEQUENT JUDGMENT, THE SAME SHOULD BE REVERSED AND THE CASE REMANDED FOR NEW TRIAL.

Respectfully submitted,

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FEDERAL COURT
SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

GUILLERMO ROSADO, JR., a/k/a William Montijo,
Jr.,

Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of New York

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 29th day of March, 19 77 at One St. Andrews Plaza
New York, New York 10007
deponent served the annexed Bring upon

U.S. Attorney Southern Dist.
Robert B. Fiske Jr.

the in this action by delivering 2 true copy^s thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 29th
day of March, 19 77

Robert T. Brin

James A. Steele
James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977